BNA

TOXICS LAW REPORTER

BNA Employee-Owned Since 1947

VOL. 12, NO. 37 PAGES 1036-1074

FEBRUARY 18, 1998

HIGHLIGHTS

Plaintiffs Seek Reinstatement of $204 Million Award in Contamination Case
Eight families who claimed that a natural gas producer contaminated their aquifer with foul smelling hydrogen sulfide want the Texas Supreme Court to reinstate a $204 million verdict thrown out by a state appeals court. The petitioners want the state high court to decide exactly what evidence is necessary to establish causation in a ground water contamination case and whether a disagreeable odor in water triggers the limitations period. **Page 1041**

Court Approves 'Contribution Bar' in Private Settlement
A federal district court in Michigan approves a superfund settlement agreement in a private contribution action that purports to insulate the settlors from future contribution liability. "This is a groundbreaking decision," comments an attorney representing the plaintiffs. **Page 1053**

Mandatory Limited Fund Settlement Violates Rule 23, Amicus Argues
Trial Lawyers for Public Justice urges a federal trial court in Ohio to throw out a mandatory class settlement on behalf of unconsenting victims of a 12-year nuclear radiation experiment, arguing that it tramples the plaintiffs' right to opt out of the class. **Page 1042**

Town May Sue for Cleanup Costs Despite Own State Law Duties, Court Says
A landfill operator's "motive" is irrelevant to its right to sue hazardous waste generators under superfund, a federal district court in New York decides. That a remediation ordered by the Environmental Protection Agency under the superfund law is "essentially equivalent" to what would be required at the landfill under state solid waste regulations is no defense to federal liability, the court finds. **Page 1054**

Minnesota Appeals Court Allows Suit Alleging Chromosome Damage
A Minnesota appeals court refuses to throw out a suit by a Green Giant employee who alleges exposure to the fungicide Captan caused chromosome damage. A jury should decide if chromosome damage constitutes present injury, the court says. **Page 1045**

BNA Special Report

The Ocean Dumping Superfund Case: Update on *U.S. v. Montrose:* This BNA Special Report examines developments in *U.S. v. Montrose Chemical Corp.*, the Environmental Protection Agency's effort to clean up a Manhattan-sized section of the ocean bottom off Southern California. The superfund case was heralded as a pioneering natural resource damages action when it was filed seven years ago. Today, the prospect of resolution seems remote. **Page 1064**

ALSO IN THE NEWS

TOBACCO: A special master in Minnesota's health care reimbursement suit recommends disclosure of more than 40,000 confidential tobacco industry documents, finding the industry's fraudulent conduct overrode attorney-client privilege claims. **Page 1046**

CITIZEN SUITS: A group of potentially responsible parties may proceed with a citizen suit under the Resource Conservation and Recovery Act at a site already in the federal government's superfund program, a federal district court in Michigan rules. The court finds nothing precludes the PRP group from pursuing injunctive relief under RCRA against a petroleum refiner that allegedly contaminated the site. **Page 1055**

NEVADA: The Nevada Environmental Commission adopts a program under which businesses can benefit from reduced penalties for environmental violations discovered and corrected through self-audits. The program applies only to state and local environmental requirements and has no application to federal violations, Manly said. **Page 1057**

LIABLE PARTIES: A federal district court in New York rejects a superfund defendant's argument that a 2-year, $4 million dollar cleanup was excessively costly and violated the National Contingency Plan. **Page 1055**

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Special Report

BNA SPECIAL REPORT

The *U.S. v. Montrose Chemical Corp.* superfund case was heralded as a pioneering natural resource damages action when it was filed seven years ago. Today, some observers say the prospect of defendants pulling out their checkbooks to clean up a Manhattan-sized section of the ocean bottom off Southern California is remote. This BNA Special Report examines developments in this complicated litigation.

The case has seen trial and appeal courts on one coast or the other rule on the statute of limitations, the scope of discovery, and even the very boundaries of the superfund site itself, a former Montrose Chemical Corp. DDT manufacturing facility east of Los Angeles. Defendants have charged government misconduct, including "vindictive" tactics and pressuring experts to change scientific testimony. The Justice Department calls the charges "unfounded mudslinging." Others say the allegations are more likely the result of the insurers' calculation that even a protracted and expensive defense, if successful, will cost an order of magnitude less than indemnity.

On Jan. 13, a federal appeals court in Washington D.C. ruled it had no jurisdiction to hear Montrose's challenge to Environmental Protection Agency activity on the continental shelf off the Palos Verdes Peninsula. At oral argument, Judge David B. Sentelle wondered why the case was even there. "There isn't even a dispute," he told the litigants, observing that both sides agreed the shelf is not on the National Priorities List. "What's a court to do?"

Even the complaint is in flux, with the government now seeking to state an EPA claim for cleaning up ocean sediments. A defense motion opposing the amendment challenges Congress' very power to create any superfund claim for off-shore resources. Meanwhile, concerns persist about threatened wildlife populations and human health risks from consuming fish contaminated with levels of DDT and PCB that are associated with cancer and neurological and reproductive problems.

BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C. TXLR 0887-7394/98/$0+$1.00

The Ocean Dumping Superfund Case: Update on *U.S. v. Montrose*

The June 1990 filing in the U.S. District Court for the Central District of California of a claim for natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act appeared to be a bold move by the United States and California. Seeking hundreds of millions of dollars, the suit envisioned one of the most ambitious environmental undertakings in history (5 TXLR 128).

Damage to the Pacific Ocean itself was the gravaman of the governments' claim. Allegations were that DDT and polychlorinated biphenyls in waste water from manufacturing facilities and repair shops seven miles inland had flowed through local water treatment plant outfalls and onto the Palos Verdes shelf, a 17-square-mile area of ocean floor a mile off the Palos Verdes peninsula south of Los Angeles. The pleadings described a massive contaminated footprint in the Southern California bight, slowly releasing poison into algae and bottom feeders, on up the food chain into fish and the eagles and peregrine falcons that eat them.

Suing for injury to the "active environment" of the open ocean bottom made the case unique.

The plaintiffs are certain California agencies,[1] the National Atmospheric and Oceanic Administration, the National Park Service, and the U.S. Fish and Wildlife Service, all as CERCLA natural resource damages trustees, and EPA, not a superfund trustee. The defendants were Montrose Chemical Corp. [2] and its shareholders and affiliated companies, and three other companies—paper manufacturers Potlatch Corp. and Simpson Paper Co., and Westinghouse Electric Corp. The Montrose defendants were alleged liable for DDT discharges; the three other defendants were said to have disposed of PCBs.[3]

A Lengthy Process. Asked about the progress of the litigation, government attorneys explained the reasons a trial of the issues still seems so far off.

The case "was not going full-bore" until the end of 1991 because of a March 1991 dismissal of the resource damages complaint and the need to amend and allow defendants to file another answer, a Justice Department attorney told BNA. Then there was an interlocutory appeal in the U.S. Court of Appeals for the Ninth Circuit on the statute of limitations for NRD claims. But, most important, she said, the case itself is atypical:

- It was brought under a relatively new statute that contained many provisions requiring judicial interpretation, especially as regards natural resource damages;
- Hazardous disposals occurred for more than 30 years, so there were hundreds of boxes of documents on corporate histories to unravel; and,
- The ocean environment is extremely complex, and the science of how contamination affects marine life was in its "infancy" when suit was filed.

Suing for ocean resource injuries is what made the case a pioneering effort, the attorney said. Although the United States had brought other NRD cases, notably for injury from discharges to New Bedford Harbor, Mass.,[4] and Puget Sound in Washington—part of a Bush administration initiative to reclaim coastal areas[5]—suing for injury to the "active environment" of the open ocean bottom made the *Montrose* case unique.

"The science was much more complex than even the New Bedford Harbor PCB case," she said. But this does not mean that the government's causation theories are not well-founded. "The difficulties of the science go more to the biologic mechanisms of harm, not to the fact of harm," she explained. "And we know so much more about these mechanisms now than when the case began."

Two Counts Alleged. The complaint alleged two claims under CERCLA. Count One was a claim for damages for injury to natural resources on the Palos Verdes shelf. Count Two was EPA's claims for injunctive relief and response costs at the Montrose Chemical superfund site in Torrance, Calif. Westinghouse, which repaired PCB-containing electrical transformers at a plant in the Los Angeles area, was named as a defendant on the first claim, but not on the second, which concerned only DDT pollution.

The defendants filed third-party claims against the Los Angeles County Sanitation District and 150 local government entities that discharged wastewater to the L.A. sewer system. Environmentalists trumpeted a 1992

[1] The California Department of Fish and Game, Department of Parks and Recreation, and State Lands Commission.

[2] Montrose no longer conducts a business, but exists as a corporate shell to hold the company's insurance policies. According to a government attorney, any company profits "were swept into the hands of its two shareholders," defendants Chris-Craft Industries Inc. and Stauffer Management Co. Insurance is paying all the company's defense costs.

[3] Potlatch Corp. and Simpson Paper Co. agreed in January 1992 to pay $12 million toward natural resource damages restoration (6 TXLR 972).

[4] *In re Acushnet River and New Bedford Harbor*, DC Mass, No. 83-3882-Y; 26 ERC 2088, 3 TXLR 1331.

[5] *U.S. v. Seattle and Municipality of Metropolitan Seattle*, DC WWash, No. C90-395, complaint filed 3/19/90; 4 TXLR 1423. According to Robert Taylor of NOAA's Office of General Counsel, the government was still developing its claim and had set no damages amount when a consent decree was entered in the case Dec. 23, 1991, for some $24 million—$12 million for sediment remediation, $5 million for habitat development, up to $5 million in real property for habitat development, up to $2 million in in-kind services for contaminant source control, and $0.25 million in reimbursement for assessment costs.

proposed settlement with the third-party defendants worth $46 million (7 TXLR 741) and celebrated when the Ninth Circuit reversed a district court decision that the NRD claim was time-barred by CERCLA § 113(g)(1) (11 TXLR 903).

But plaintiffs' original claims—the trustees' ocean resources claim and EPA's cost recovery claim for the Montrose Chemical plant—progressed slowly. Some say that in addition to the difficulties to be expected in litigating a newly created right to an unusual remedy, the case was knocked far off-track in July 1996 by an EPA decision that defendants called "a sneak attack."

EPA Sneak Attack? The agency decided to address risks to human health from the contaminated ocean sediments, which have an estimated volume of 11 million cubic yards. Under CERCLA, NRD trustees are charged with remediating injury to natural resources and EPA with protecting human health and the environment. Usually their efforts would not overlap; one would take lead. However, the defendants say, fearing a bad result in the Ninth Circuit when Justice appealed the limitations ruling, EPA "stepped into the shoes" of the natural resources trustees in an attempt to revive the dying claim.

Some say the case was knocked far off-track in July 1996 by an EPA decision that defendants called a "sneak attack."

EPA says the change in approach was triggered not by any litigation strategy, but by the agency's review of the October 1994 trustees' report, which pulled together, for the first time, an assessment of the distribution and character of contaminated sediments, including the accumulation of DDT and PCBs in fish, especially in the White Croaker, a popular food among Asian residents in and around Los Angeles.

After assessing the possibility of human health risks from the shelf, the agency issued two memos in July 1996 that expanded the Montrose plant site to include the ocean area for agency "management purposes."[6]

"In July 1996, when the United States was appealing the dismissal of [the resource damages claim], EPA issued two memos," defense attorney Peter Simshauser told BNA. The first said that "because of new information" EPA had reconsidered its decision to defer to the NRD assessment process being conducted by the trustees with regard to the Palos Verdes area of the continental shelf.

EPA said that after reviewing the trustees' expert damage assessment reports, the agency concluded there was sufficient threat to human health and the environment on the Palos Verde shelf to justify a "nontime critical removal" of polluted sediments. The second memo said the agency would manage the removal activity as part of the Montrose plant site[7]—the old factory boundaries plus some adjoining storm water pathways—in light of the fact that sewage from the site caused the hazardous conditions on the shelf.

When Justice first alerted trial judge Andrew C. Hauk at a March 22, 1995, hearing that EPA was considering asserting superfund jurisdiction over the Palos Verdes shelf, the news was not well-received. Earlier in the litigation the judge had warned, "[W]e're not here to make things easy for the government. As a matter of fact, it's a famous saying, the government's got to turn square corners." At the March 22 hearing, he accused the government of "hiding, and getting ready to pounce on the [defendants]."

Hauk had already made key rulings against the plaintiffs. He dismissed the NRD complaint as "vague," requiring the government to file a second amended complaint adding specific allegations of resource injuries to its pleading (6 TXLR 616). He dismissed the NRD claim again on statute of limitations grounds (9 TXLR 1207) and ruled that the complaint alleged only one "incident involving release" under CERCLA § 107(c)(1), thereby limiting the plaintiffs' potential natural resource damages recovery to $50 million.

Both rulings were reversed on appeal (11 TXLR 903). During the appeal, the Justice Department unsuccessfully sought to have Hauk removed for bias. A "reasonable observer" might conclude from Hauk's courtroom comments that the judge wrongly believes the governments' suit is "improperly influenced" by environmental groups, the government said. It cited disparaging remarks by Hauk about government environmental experts as well as comments such as: "The government, with overwhelming power, pointy heads, these young attorneys out of law school, writing all these trashy regulations that don't make any sense . . . thwarts everybody."

Transcripts of the hearing reveal that Hauk also made several comments about an EPA regional administrator, whom the judge accused of being a former member of the board of directors of the Natural Resources Defense Council. A courtroom observer told BNA the judge used the term "pointy heads" more than 30 times during the hearing and at one point stuck out his tongue at a government attorney.

The Ninth Circuit concluded there was no indication that the judge was ruling against the government "based upon any of his often expressed opinions concerning environmental science or the government," but some government attorneys are not convinced.

Montrose Attacks EPA Move. In a brief to the U.S. Court of Appeals for the District of Columbia Circuit opposing EPA actions on the shelf, Montrose said EPA began to consider treating the shelf and the inland superfund site as one site only after the defendants moved to dismiss the trustees' NRD claims as time-barred.[9]

[6] EPA proposed subsequently to amend the Montrose Chemical Corp. National Priorities List site listing to include the DDT and PCB contamination on the shelf in a notice of proposed rulemaking (62 FR 44431, Aug. 21, 1997).

[7] CERCLA § 104(d)(4) says that, regardless of NPL status, "[w]here two or more noncontiguous [hazardous waste sites] are reasonably related on the basis of geography, or on the basis of the threat, or potential threat to the public health or welfare or the environment, the President may, in his discretion, treat these related facilities as one for purposes of [§ 104]." It does not allow EPA to expand preexisting NPL sites without satisfying CERCLA requirements for listing new sites. See *Mead Corp. v. Browner*, 100 F.3d 152, 155 (DC Cir 1996).

[9] Final Joint Opening Brief of Petitioners Montrose Chemi-

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A letter to the Ninth Circuit during the pendency of the statute of limitations appeal appeared to support the defendants' allegations. In that letter, plaintiffs took the position that the limitations question was mooted by EPA's determination to take action on the shelf because the applicable limitations period for cost recovery actions—CERCLA § 113(g)(2)—would not begin to run until the agency completed its removal.

Montrose described the shelf management memos as "a thinly-veiled attempt to circumvent the district court's dismissal of the government's NRD claims, cloaked in the guise of an EPA-directed response action." The brief documented what it said was EPA's long-standing position that the shelf should not be on the National Priorities List—the list of the nation's most contaminated hazardous sites—and continued:

> EPA's remarkable about-face was primarily motivated by the government's desire to resuscitate its then-dismissed NRD claims. . . . EPA improperly sought to manipulate the NPL status of the [shelf] in order to evade the earlier dismissal of the government's NRD claims on statute of limitations grounds. . . . Based on the Agency's historic refusal to place the PVS on the NPL, it appears likely that EPA's July 10 [1996] decision arose as a result of pressure from other members of the executive branch to have EPA save the Administration from the embarrassment caused by the Trustees' apparent mismanagement of the NRD case.

Justice Responds. A Justice Department attorney told BNA, however, that more than a year before the July 1996 memos, Justice had specifically alerted the defendants to the possibility of EPA action on the shelf.

In March 1995, EPA sent Montrose counsel Karl S. Lytz, who practices in San Francisco, copies of letters from several environmental groups in the Los Angeles area asking EPA to consider conducting a response action on the shelf. The agency's cover letter said:

> EPA has not yet made a determination as to what action, if any, it will take with respect to the offshore sediments contaminated by releases from the Montrose plant. However, EPA also makes clear that it is considering action regarding the DDT and PCB contamination on the Shelf pursuant to [CERCLA] including expansion of the Montrose Chemical NPL Site to the offshore area. Such action would, if implemented, have significant effect on the pending natural resource damage claim . . .

Even without this letter, the shelf's being part of the Montrose site "should have come as no surprise to the defendants," the attorney said. In the first place, the plant, sewer pipes and outfalls to the ocean bottom are one "great contaminant pathway," according to the trustees' October 1994 NRD assessment report.[10] Profiles of hazardous substance contamination on the ocean bottom show that DDT concentrations not only track the plant's output, with deposits rising in years of higher production, but also that concentrations of both PCB and DDT are highest near the outfall area and become less along the line of prevailing currents.

That the Palos Verdes shelf is part of the Montrose superfund site "should have come as no surprise to the defendants."

DOJ ATTORNEY

Furthermore, as far as back as 1989, the NPL listing papers for the Montrose chemical plant site described the shelf as part of that site. The EPA administrative record supporting the listing decision contained a study that concluded the "large reservoir" of DDT contamination on the shelf came from the Montrose plant. The listing record also posited a human health risk from consumption of DDT-contaminated seafood from the shelf.[11]

A consent decree proposed in 1992 between the plaintiffs and original defendants Potlatch Corp. and Simpson Paper Co. also defined the area covered by the decree to include the Palos Verdes shelf. The settlement stated that, in addition to superfund response actions undertaken at the Montrose plant site, EPA had conducted a preliminary evaluation of Santa Monica Bay, which includes part of the shelf. The decree reserved the agency's right to take other action on the shelf. Decades earlier, environmentalists cited in a *Los Angeles Times* article published Oct. 7, 1970, estimated that 75 percent of the DDT contamination in the Santa Monica Bay came from the Montrose plant.

Amending the Complaint. Based on its July 1996 management decision, EPA has begun, as part of a removal action on the shelf, an Engineering Evaluation and Cost Analysis to address contaminated sediments. As part of the EE/CA, the agency said it will screen cleanup alternatives for effectiveness, implementability, and cost, and compare the feasibility of implementing one or more of the cleanup options to a no-action option.

In November 1997, Justice filed a motion to amend its complaint to add a count for the recovery of costs incurred for these activities. DOJ's brief in support explains the thrust of the amendment as follows:

> Because EPA has assumed responsibility for responding to the contamination on the Palos Verdes shelf, the trustee agencies no longer seek natural resource damages relating to the physical restoration of the sediments on the shelf. Simply put, the decision of whether and how to clean up the sediments is now EPA's job, and the costs of that cleanup would only be recovered under a claim for EPA's costs and not as part of the Trustee's claim for natural resource damages under the first claim for relief.

The trustees' damages count still includes claims for the costs of damage assessment, restoration of birds, and compensation for lost use of the resources.

According to a brief by Westinghouse successor CBS Corp.,[12] which opposes the motion to amend, the government is saying that "the problem of the sediments

cal Corporation of California, et. al, Oct. 8, 1997, No. 96-1334.

[10] Federal and State NRD Trustees' Southern California Bight Natural Resource Damage Assessment Expert Reports, Oct. 4, 1994.

[11] USEPA Region 9, Toxics and Waste Management Division, Investigative Report, No. C(83)E002 (April 11, 1983) at 7.

[12] CBS Corporation's Memorandum in Opposition to Plaintiffs' Motion for Leave to Amend Their Complaint, Jan. 20, 1998, No. 90-3122-AAH(Jrx).

should be lifted out of Count One and put into Count Two, where 'the EPA' rather than 'the trustees' will deal with it." The plaintiffs say this amendment is not legally necessary, but is desirable merely to "bring matters up to date," according to CBS.

The defendant's opinion of this rationale? "Baloney." The EPA and the trustees are all the federal government, CBS says. "This moving around is just the bureaucracy allocating responsibility within itself." But the proposed amendment also radically changes the case against CBS, the company argued.

The governments' proposed expansion of Count Two would, for the first time, add CBS as a defendant on that count even though, the company argues, the plaintiffs "know" that CBS, which discharged only PCBs, cannot be liable for damage to any of the natural resources on the shelf, which it says are caused solely by DDT.

CBS also objects to having been singled out as a PCB defendant when records indicate that the company responsible for 80 percent of the PCB contamination was not named a defendant. CBS is responsible for less than 1 percent of the contamination, it says, although being only minimally responsible for cleanup costs is no defense under the superfund law.

The government disputes all of these contentions, saying they ignore data Westinghouse collected during its operation of the plant that show high levels of PCB discharges.

An independent ground for CBS' objection to the amended complaint is that, according to the company's brief, the trustees "have not really let go of these sediments." If they do not like what the EPA comes up with, the trustees "will grab back what they have tried to shuffle off to 'the EPA.' "

CBS says it fears the EPA's efforts on the Palos Verdes shelf will be acceptable to the trustees only if the agency is "sufficiently punitive." The brief quoted the deposition of William Connor, Ph.D., chief of NOAA's Damage Assessment Center in Silver Spring, Md., in which Connor was asked what would happen if EPA decided the best course of action to take on the shelf was to let natural processes cleanse the area.

CBS's counsel asked, "And what you are saying, then, is at a minimum, if EPA reached a no-action alternative the trustees would be able to reconsider sediment restoration?" Connor answered, "I think that we would do that."

This is "particularly menacing" to CBS because "the most appropriate conclusion to which the EPA could come is to take no action at all, other than, perhaps, monitoring the conditions" on the shelf, the company said. No action is recommended for several reasons, among them 1) that there is no need to cap the sediments in light of natural biodegradation and the fact that there is "no real likelihood of bioturbation lifting them from the depths," and 2) that there is "substantial danger" that dumping tons of dredged spoils onto the shelf will push the buried sediments up to the surface, "to say nothing of the possibly toxic nature of the dredged material itself."

Irony of Litigants' Positions. Ironically, according to attorneys at the Justice Department, by taking action on the shelf itself, EPA is likely to save defendants money in the long run. An immediate advantage is that, as a result of EPA's involvement, the Justice Department was able to cut down on the number of experts needed to testify because EPA can testify to many matters itself.

A Justice attorney said, "Defendants claim they are facing $1.2 billion to $1.8 billion in liability when they are before the court, but they tell their shareholders that the liability is $300 million to $1 billion." DOJ has put out a settlement figure of $225 million to $250 million for resource damages and EPA cost recovery on the shelf. The cost estimates have dropped over the years as more has been learned about the site and as EPA and the trustees have become more experienced in cleanup and restoration.

Another reason current cost estimates are less is efficiencies resulting from EPA's decision to take responsibility for cleanup of the shelf sediments, the major source of the chemicals contaminating the food chain. "EPA is better equipped to do source control, having vast experience with soil remediation and with the procedures in the superfund law's National Contingency Plan," one DOJ attorney said. "The trustees have primarily been limited to wetlands and species restoration."

EPA also has better access to funds. The trustees, who have access to superfund monies only after they have "exhausted all administrative and judicial remedies to recover . . . from persons who may be liable,"[13] would have to wait years for funds to remediate the sediments, she said. EPA need not await the results of litigation, but can use the Hazardous Substances Trust Fund (the Superfund), superfund settlement proceeds being held by the court, and other sources of funds. To the extent contaminants are contained or removed more quickly, the recovery period for the injured natural resources is accelerated and the resulting damages are reduced.

EPA Rulemaking Reviewed in D.C. Circuit. Of course, these "savings" will accrue only if the government prevails. The battle is proceeding on two fronts—with EPA moving to add the shelf to the Montrose NPL site and amend the complaint to reflect this, and the governments marshalling scientific evidence to prove the defendants' activities caused the resource injuries.

A move by Montrose to rein in EPA activities on the shelf resulted in a draw in the D.C. Circuit. Montrose argued that the agency violated CERCLA § 105 by expanding the Montrose site to include the Palos Verdes shelf without following notice and comment rulemaking procedures and demonstrating that the shelf itself qualifies for NPL listing.

In its Jan. 13 opinion in the matter, the appeals court acknowledged that superfund listing drastically increases the chances of costly government activity and liability for PRPs (12 TXLR 927). EPA may take superfund response actions at non-NPL sites, but CERCLA limits such actions to $2 million and one year.

[13] CERCLA § 111(b)(2)(A).

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EPA's efforts on the Palos Verdes shelf will be acceptable to the natural resource trustees only if the agency is "sufficiently punitive."

Montrose, which said the uncertain legal status of the shelf made the company fear being hit with a bill for EPA shelf activities that went beyond these limits, asked the court to vacate the memoranda and order the agency to cease taking actions inconsistent with CERCLA's rulemaking requirements. It sought to enjoin EPA from shelf activities exceeding CERCLA § 104(c)(1)'s one-year and $2 million limits on responses at non-NPL sites.

However, because the court found that the July 1996 memoranda did not constitute a "regulation" amending the NPL, it dismissed the case for lack of jurisdiction. But the court also said that "lest the [EPA] memoranda might be interpreted to contain an agency decision affecting the Shelf's NPL status, we vacate that decision." It added that Montrose could challenge excessive expenditures in any future EPA proceedings to recover such costs.

Evidence of Harm, Burden of Proof. One defense attorney speculated that another reason the government took steps to add an EPA claim for the shelf is that it recognized the resource damages claims were getting bogged down in disputes over the validity of government scientific data, and so were vulnerable for reasons other than the limitations issue.

A brief by CBS drives the point home, claiming that "discovery has shown the utter absence of a causal connection between PCBs and supposed injuries" to marine mammals and seabirds.

Government officials agree that their research does not prove the contaminants have injured marine mammal populations. John Cubit, NOAA's director of injury assessment in California, told BNA the trustees are not alleging such injuries, explaining that they are very difficult to document. Another official described the difficulties in terms of sea lions.

"Sea lions are elusive," he said, explaining it is "difficult to follow them, watch their birthing, determine the particular impacts [of the various foreign chemicals in their bodies] and show a population decline.

"The science is complex and this is cutting-edge science, but that does not mean the injuries to animals are not there. We have just been more successful in proving some than others." In fact, he said, due to certain protections that are in place out on the Channel Islands, marine mammal populations have risen. "But that doesn't mean these mammals don't also have extremely high levels of contaminations, and in fact they do. When they die off, eagles eat their carcasses washed up on the beach, or seagulls eat them and eagles eat the seagulls." In this connection, the attorney said, the clear evidence of DDT and PCBs in marine mammals is important to the trustees' case because the mammals are "a primary pathway of contaminants to other species, particularly to the eagles, whose injuries are well-documented."

On one point, however, the litigants agree: EPA's claims might be easier to prove. "A superfund trustee is just like a regular citizen," one government attorney said. "When a trustee litigates a superfund claim, it is like John Doe proving a negligence case—every element of the claim has to be proven by a preponderance of the evidence.[14] EPA has available the streamlined procedures of the superfund statute."

CERCLA is clear that EPA does not need to prove an actual injury to recover its costs or to go in and assess environmental conditions. "EPA's concern about the environment frequently gets lost because its mission has been primarily in the past focused on humans," one government attorney said. "But we are concerned about both here; our goal is to eliminate risks to humans and the environment, threats as well as injuries."

Hearing Scheduled. Meanwhile, the rulemaking to add the ocean shelf to the existing NPL site is proceeding and a hearing has been scheduled for Feb. 18 on the governments' motion to amend their complaint.

The hearing will give the trial court in California a second chance to rule on CBS's contention that the causes of action for superfund costs relating to the shelf are beyond congressional authority to create. The United States successfully opposed a defense motion in limine in 1993 to preclude plaintiffs from recovering for any injury or damage that allegedly occurred within the three-mile limit. The trustees opposed the motion on the ground that the affected "fish swim and birds fly" and may do so beyond the three-mile limit, but the motion eventually was denied, with leave to refile, only on procedural grounds.

CBS is again arguing that the government's claim is deficient and that amending the complaint is therefore futile. The federal Submerged Lands Act of 1953 stripped the federal government of all power to provide for recovery for injury to any property within the three-mile coastal limit, the brief explained. EPA's expanded claim seeks recovery of costs relating solely to its study of, and possible remedy for, the ocean sediments themselves. Unlike birds and other marine life, the sediments are "unquestionably wholly within" the coastal limit and beyond CERCLA's reach, the company said.

The battle is proceeding on two fronts—with EPA moving to add the shelf to the Montrose site and amend the complaint to reflect this, and with the governments' marshalling scientific evidence to prove the defendants' activities caused the resource injuries.

The only relevant power the Submerged Lands Act reserved to the federal government was the power to regulate interstate commerce within the limit, CBS said.

[14] However, the trustees' assessment of natural resource damages enjoys a rebuttable presumption under CERCLA § 107(f)(2)(C).

Congress otherwise "expressly and firmly vested the coastal states with all rights to and governance of" such property, CBS said. Thus, Congress had no legislative power to enact CERCLA provisions that apply to offshore waters.

> This is not a matter of the standing of the state or the federal plaintiff to recover under CERCLA, it is a matter of the absence of Congressional power to have enacted such provisions at all, unless Congress amended the Submerged Lands Act itself to wrest back the rights it had given to the states.

At a minimum, if the court allows the complaint to be amended, it should condition the grant to prevent "any further changes of position by one or another part of the executive branch." Since the plaintiffs are now taking the position that EPA is the proper agency to take charge of the sediments on the shelf, they should agree not to engage in any additional "mind-changing" on the issue, CBS said.

Discovery Rulings. In January 1997, the Ninth Circuit reinstated the trustees' damages claim[15] and discovery began into the research and agency decisions underlying early estimates that shelf remediation could cost $1 billion.[16]

Defendants sought disclosure of documents comprising a study by the University of California at Davis on human health risks presented by the ocean sediment contamination. The defendants said the discovery was relevant to assessing the legality of EPA's activities in investigating the PCBs and DDT on the shelf. EPA resisted, saying disclosure was barred by CERCLA's preenforcement review bar, Section 113(j).

"DOJ argued the discovery being sought was related not to the activities of NOAA and the state trustee, which are the subject of Count One, but solely to EPA's activities on the shelf, which have not yet been made the subject of any complaint," defense attorney Peter Simshauser told BNA.

Defendants' allegations of government misconduct are all vigorously denied by the Justice Department.

The Justice Department sought a protective order prohibiting production of the U.C. Davis documents on the ground that they were draft, pre-decisional, and deliberative. DOJ also said that any discovery to challenge EPA's decision to investigate the shelf would go beyond the administrative record and is prohibited by the superfund law. CERCLA § 113(j) mandates record review of remedy decisions if and when EPA's activities on the shelf are made the subject of an enforcement suit, Justice said.

Although the government withdrew its record review argument when the Ninth Circuit reinstated the NRD claim, a special master granted the protective order May 27, 1997, prohibiting the production of documents on both privilege and record review grounds. Defendants sought independent review by the federal district court.

On Oct. 6, 1997, the district judge overturned the master's restrictions.[17] It found the defendants entitled to discovery "of all matters relevant to the subject matter of this action," including those related to EPA activities on the shelf.

"The court does not need to determine at this time what the scope of judicial review of any action yet to be taken by EPA would be," the district court said. It ruled that defendants are entitled to discovery "reasonably calculated" to obtain evidence to supplement the agency record and to substantiate their allegations of misconduct by the government and its witnesses. The court specifically ruled that the defendants could depose experts designated by the government but later withdrawn.[18]

Defendants Allege Misconduct. Defendants' allegations of government misconduct are all vigorously denied by the Justice Department.

"There is absolutely no proof that any misconduct occurred," one attorney told BNA, adding he finds the charge "offensive." As far as the allegations involving expert testimony in particular, the attorney said experts were told consistently to follow "regular procedures in writing their scientific reports."

One of the depositions was of economist Dr. Raymond Kopp, who headed work on a public opinion survey that asked some 2,800 California residents, hypothetically, if they would be willing to pay higher taxes to clean up the shelf. From the results, the government calculated that damages for lost use of shelf resources would be $575 million.

The deposition revealed that the survey team "made extreme misrepresentations to the survey participants," the CBS brief said. The team repeated what CBS said are the "discredited allegations" that fish on the shelf had trouble reproducing and that their populations had been artificially lowered by DDT. The team also stated that birds such as peregrine falcons on the shelf were experiencing "unique" reproductive problems, whereas, according to CBS, plaintiffs' own experts have concluded that the falcons reproduced successfully.

[15] 43 ERC 1946, 11 TXLR 903.

[16] The plaintiffs now estimate total damages at $357 million, total costs at $125 million, and offer settlement of the costs and damages portion of the case at $250 million.

[17] *U.S. v. Montrose Chemical Corp. of California*, DC CCalif, No. 90-3122-AAH(JRx), 10/6/97.

[18] Also at issue was an order protecting from discovery information about the most recently proposed third-party settlement. The last proposed settlement between the plaintiffs, LACSD, and local governments that used the Los Angeles sewer system was lodged in 1992. But the Ninth Circuit rejected that consent decree in 1995 based on the plaintiffs' refusal to identify their total damages claim or provide any other evidentiary support for the fairness of the proposed decree (50 F.3d 741, 40 ERC 1475, 9 TXLR 1207).

The defendants claimed that, after remand, the plaintiffs merely lodged "the same basic settlement" with the district court. To challenge the "new" agreement, the defendants sought to depose the plaintiffs' representatives at settlement talks. The special master imposed limits on their discovery, but the district judge vacated the protective order to the extent it prohibited inquiry into the facts underlying the settlement. The court ruled, however, that the defendants "may not inquire into the settlement discussions leading up to the proposed Amended Consent Decree." Its ruling does not constitute a waiver of any applicable privilege, the court said.

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The degree of problems such as eggshell thinning is not statistically different from that in other areas in California and Oregon, the defendants said.

A government attorney told BNA that although some birds have returned to the shelf area, they have done so only as a result of "superhuman efforts." For example, one organization watches nesting eagles on off-shore islands, removes their eggs to a mainland hatchery where they can be protected from breakage and desiccation, and then returns the fledglings to the nest. Without such labor-intensive efforts, populations would undoubtedly fall, he said.

The defendants complain of other alleged misconduct. In 1988, the LACSD applied for a waiver of Clean Water Act requirements for full secondary treatment. The district did not want to have to filter suspended sewage solids and argued that discharging suspended solids was helping to cover the old DDT footprint. In refusing the waiver in 1989, EPA said depositing sewage solids to cover the sediment was not necessary because the shelf area is naturally depositional and is not going to erode. Now EPA is "ignoring" its earlier position and considering capping as a remediation alternative, Simshauser said.

EPA staff remember the events surrounding the Clean Water Act waiver request differently. A spokesman said that the agency took the position in 1989 that it had not yet decided whether a cap is the preferred remedy for the shelf contamination. But it told the sewer authorities that "even if we want to cap it, we do not want to cap it with effluent. We would cap it with sand or other clean material."

Bottom Feeders and the Bottom Line. A plaintiffs' attorney cautioned "it is important not to lose sight of the bottom line." All the legal maneuvering threatens to obscure the serious problems the litigation was meant to address, he said.

Both fish and the predators that eat them have suffered ill effects, he said. "For 25 to 30 years, there were no eagles, no pelicans," a government attorney said. "There were not even single individuals, much less healthy populations." The cause was eggshell thinning and other eggshell deformities, such as excessive porosity, in eagles, peregrine falcons, pelicans, cormorants, and other birds with high concentrations of DDT and PCBs in their systems.

Human health effects have been the focus of renewed concern.

Human health effects have also been the focus of renewed concern. EPA's Integrated Risk Information System lists both DDT and PCB as probable human carcinogens, based on carcinogenicity in mammals in laboratory studies. The chemicals also have been linked to deleterious non-carcinogenic effects, particularly neurological and reproductive problems in children exposed in utero. The pathway to humans is the bioaccumulation of the chemicals in fish, especially bottom feeders like the dover sole and white croaker, also called the kingfish.

Despite restrictions on commercial fishing in the Palos Verdes area since 1990, contaminated fish are still making their way to local markets. A study in 1997 conducted by an independent laboratory for the Santa Monica-based environmental group Heal the Bay tested 132 white croaker samples bought in Los Angeles and Orange County. It found that 84 percent of the samples posed an unacceptable cancer risk because of high levels of DDT. A 1994 study by the state Department of Fish and Game found that more than 97,000 pounds of white croaker were landed in Los Angeles County ports by commercial fisherman.

White croaker is sold in California almost exclusively in Chinese, Filipino, Korean, and Vietnamese communities. An EPA study from 1994 concluded that the average daily consumption of white croaker in the Los Angeles area ranged from a low of 10.7 grams for whites to 23.6 grams for Asians. The same study found that 50 percent of recreational anglers were unaware of California's fish advisories warning against consumption of fish from the polluted area.

An EPA attorney called "astounding" any argument that these chemicals are not harmful.

Theo Colborn, director of the Wildlife and Contaminants Program at the World Wildlife Fund in Washington, D.C., told BNA, "There's a tremendous amount of literature out there on deleterious effects of PCBs, including immune system suppression and reproductive deformities."

For example, PCB-153, which typically makes up some 20 percent to 25 percent of the PCBs in the body, is slowly hydroxylated into a powerful estrogen. This is especially dangerous during mammalian development, when "the additional zapping of estrogen, which should not be there, interferes with messages necessary for the embryo's normal brain and morphological development," Colburn said.

Scientists studying wildlife populations with "extremely high concentrations of PCBs have found two full hermaphrodites among the 450-member Beluga whale population in the St. Lawrence River," she said. This is the kind of deformity that occurs when metabolized contaminants like PCBs interfere with hormone signals during embryonic development, Colburn explained.

A defense attorney countered "there is a big difference between proving a cause and effect relationship and showing a correlation." Part of this is the difficulty of separating out the effects of PCBs and other contaminants when both are present, he said.

"That is precisely the reason scientists are using a 'weight of the evidence approach,'" Colburn said. "You look at data from different teams using various study designs to examine different species and classes of animals, and see the same results in the presence of these chemicals and you can be confident of the conclusions."

An EPA memorandum from 1996 discussed the agency's plans for the Palos Verdes shelf, concluding that concentrations of DDT and PCBs in dolphins, porpoises, whales, seals, and sea lions are

> similar to concentrations that have been associated with effects such as reproductive impairment and suppressed immune response in other mammalian species. Although these species are very difficult to sample and study for a variety of reasons, it is reasonable to be concerned about such risks to marine mammals feeding in the area.

Cubit cited anecdotal evidence of deleterious effects. He told BNA, for example, that "a pod of killer whales has been sighted in the California bight for many years, but has never been sighted with young." While not evidence of chemical harm, "it is something to explore," Cubit said.

The 1994 trustees' report confirms the presence of elevated levels of DDT and PCB in animals on the shelf. Discussing birds, the report cites a 1991 study on the effects of PCBs on fish-eating birds in the Great Lakes region that describes "high embryonic and chick mortality, edema, growth retardation and deformities." The report also says:

> The effects of PCBs on avian reproduction are broader and less well defined than for DDT. . . A further difficulty is the separation of the PCB effects from those of DDE [a metabolite of DDT]. Whereas the most serious effect of DDE—eggshell thinning—can be separated from effects of PCBs, the reverse is much more difficult.

The report concludes, however, that "it is possible to determine a threshold level for PCBs above which toxic manifestations can be expected."

While some superfund defendants may be digging in their heels in the hope that proposed superfund reforms will reduce their potential liability, any new legislation is unlikely to hold much promise of relief for NRD defendants.

Who Should Pay? Who Will Pay? Briefs and supporting documents filed in the *Montrose* litigation repeat the same facts. From 1947 to 1983, the Montrose's Torrance plant was the world's single largest producer of DDT. Significant concentrations of DDT were present in process wastes from the plant that were discharged to the county sewer system and then through an ocean outfall on to the Palos Verdes shelf, and were also disposed of through ocean dumping. The Los Angeles Regional Water Quality Board estimates that Montrose arranged for the ocean dumping of waste containing as much as 1.5 million pounds of DDT from 1947 to 1961. Another 4 million pounds of DDT was present in wastewater discharged to the sewer system from 1953 to 1971, the board says. Each of the other defendants is also alleged to have been responsible for the offshore discharge of either DDT or PCBs.

That the discharges were standard industrial operating procedure and legal when they occurred is no defense under the superfund law. The justification for this is often said to be that, in passing the superfund law, Congress made the policy decision that those that profited from the disposal of hazardous substances, and not the taxpayer, must pay for cleaning them up. But this is a false distinction. In passing CERCLA, Congress provided for taxing the chemical and petroleum industries to fund the Superfund, and it is largely these monies that pay for cleanup when responsible parties do not.

While there has been speculation that some superfund defendants in courts across the United States are digging in their heels in the hope that proposed superfund reforms will reduce their potential liability, any new legislation is unlikely to hold much promise of relief for NRD defendants. Little is being said about changing that side of CERCLA; any coming changes are likely to affect only liability to EPA for cleanup costs. If such changes find their way into law, the defendants may wish that rather than fighting the trustees' handoff of responsibility to EPA, they had argued for it sooner.

Meanwhile, the United States continues to file NRD actions around the country and recover damages through litigation and settlement. Whether the *Montrose* case will be another success story remains to be seen.

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 TXLR 0887-7394/98/$0+$1.00